Onyango & another v Njiriri (Environment and Land Case Civil Suit 219 of 2018) [2022] KEELC 3701 (KLR) (12 May 2022) (Judgment)

Neutral citation: [2022] KEELC 3701 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT AND LAND CASE CIVIL SUIT 219 OF 2018

JO MBOYA, J

MAY 12, 2022

BETWEEN

ARTHUR DAVID ODUOR ONYANGO ..... 1ST PLAINTIFF

DEBORAH ANYANGO ONYANGO ..... 2ND PLAINTIFF

AND

DANIEL NJUGUNA NJIRIRI ..... DEFENDANT

JUDGMENT

Introduction

1. Vide Plaint dated May 9, 2018, the 1st and 2nd Plaintiffs herein have approached the Honorable Court seeking the following Reliefs:

    i. A Declaration that the Defendant as from May 28, 2014 was/ is a Trespasser.

    ii. The Defendant do yield vacant possession of Flat No 2, situated on L R No 1870/V/228 Westlands- Nairobi County.

    iii. Damages for loss of Mense Profits and Rent at prevailing rates from May 28, 2014 to the date of delivery of vacant possession or the determination of the suit.

    iv. In the alternative, Damages for Trespass.

    v. Cost of the suit and Interests.

    vi. Any other Relief that the Honorable Court deems fit and just to grant.

2. Upon the service of the Plaint and summons to enter appearance, the Defendant herein, duly entered appearance and thereafter filed a Statement of Defense in respect of which same denied and/or contested the averments contained in the body of the Plaint.

Evidence by the Parties:

Plaintiffs' Case:

3. The 1st Plaintiff herein testified as PW1 and same essentially adopted and ratified the contents of the written statement dated May 8, 2018.

4. Other than the adoption of the written statement dated May 8, 2018, the witness herein further stated that the 2nd Plaintiff and himself entered into and executed an Agreement for Sale in respect of the premises known as Flat No 2, situated on L R No 1870/V/228 Westlands, Nairobi County with the Defendant herein.

5. Further, the witness testified that pursuant to the Agreement for Sale, it was agreed that the witness and the 2nd Plaintiff were to sell to and in favor of the Defendant the suit property at the agreed purchase price of Kshs 15,000,000 only and the Defendant was obliged to pay a 10% stake holder sum equivalent to Kshs 1, 500, 000/= only, at the execution of the Agreement for Sale.

6. On the other hand, the witness testified that indeed the Defendant paid the 10% stakeholders sum vide two bankers cheques dated November 11, 2013 and November 19, 2013, respectively.

7. Nevertheless, the witness testified that despite paying the stake holder sum, namely, the sum of Kshs 1, 500, 000/= only, the Defendant herein failed and/or neglected to pay the balance of the purchase price amounting to Kshs 13, 500, 000/= only, either within the contractual 90 day period or at all.

8. As a result of the failure and/or neglect by the Defendant to pay the balance of the consideration, the witness testified that same was constrained to and indeed issued a completion notice to the Defendant, which essentially drew the Defendant's attention to the completion timelines and thus implored the Defendant to complete his part of the bargain.

9. Be that as it may, the witness further testified that despite the issuance and service of the Completion Notice dated April 28, 2014, the Defendant failed to pay the balance of the purchase price either in line with the terms of the Sale agreement or at all.

10. It was the witness' further testimony, that based on the failure by the Defendant to comply with and/or adhere to with the terms of the completion notice, same instructed the firm of advocates, namely, M/S P J Kakad Advocates to issues a Rescission notice upon the Defendant.

11. Consequently, the witness testified that upon the issuance and service of the Rescission Notice, the Agreement for Sale between the Plaintiffs and the Defendant stood effectively rescinded upon lapse of the 21 days period. For clarity, the witness testified that the Sale Agreement was rescinded on May 28, 2014.

12. On the other hand, the witness further testified that even though the Sale Agreement provided that the Defendant was only to take possession of the suit property upon payment of the entire/full purchase price in terms of clause 6 of the sale agreement, the 2nd Plaintiff and the witness decided to allow the Defendant to enter upon and take possession of the suit property, albeit in good faith and on trust that the Defendant would conclude his part of the sale contract.

13. Besides, the witness testified that even though the Defendant failed to pay the balance of the Purchase price and even after the rescission of the Sale agreement, the Defendant remained in occupation of the suit property up to and including June 2018, without payment of any rent or at all.

14. Based on the foregoing, the witness therefore sought to have the Defendant declared as a trespasser in the suit property with effect from the date when the Agreement for Sale was rescinded and thereafter that the Defendant be ordered to pay Mense Profits for the entire duration that same remained in occupation of the suit premises, after the rescission/ termination of the Sale Agreement.

15. Finally, the witness herein referred to the list and bundle of documents dated May 9, 2019, which documents were thereafter adopted by the witness and same were duly admitted as exhibits P1 to P9, respectively.

16. With the testimony of the witness, namely, PW1, the Plaintiffs' case was duly closed.

Defendant's Case

17. The subject matter was listed for hearing on November 9, 2021, and when same was called out, the Defendant's advocate sought for leave to cease acting on behalf of the Defendant. Consequently, the request and/or application by counsel for the Defendant to cease acting, was duly allowed.

18. Following the cessation of the advocate to act for the Defendant, the Defendant herein applied for adjournment to be able to re-organize himself and to take up the conduct of his (Defendant's) Defense case.

19. In the alternative, the Defendant also indicated that where appropriate, same would consider engaging another advocate to take up the conduct of his case.

20. Pursuant to and premised on the application by the Defendant, the court proceeded to and granted the adjournment sought for and thereafter the subject matter was listed for hearing on February 21, 2022.

21. Come February 21 2022, the Defendant herein failed to attend court and upon being satisfied that the scheduled hearing date was taken in the presence of the Defendant, the court ordered that the matter do proceed for hearing.

22. In nutshell, it is imperative to note that despite opportunity being afforded to the Defendant, same did not testified and/or avail any evidence in support of his Defense.

23. Based on the foregoing, the Defense case was closed without any evidence having been tendered and/ or otherwise being adduced.

Submissions by the Parties:

24. At the close of the hearing, the Plaintiffs' counsel sought for time within which to file written submissions in support of the Plaintiffs' case. In this regard, the court duly granted latitude to the Plaintiffs, as well as the Defendant, to file and exchange written submissions.

25. Pursuant to the foregoing, the Plaintiffs proceeded to and filed written submissions on March 24, 2022.

26. According to the Plaintiffs, though the Sale agreement indicated that the Plaintiffs herein were not to part with possession over and in respect of the suit premises, prior to and/or before the payment of the final purchase price, same however allowed the Defendant to enter and take possession immediately upon the payment of the stake holder sum.

27. Nevertheless, the Plaintiffs have further submitted that upon the failure by the Defendant to pay and/ or liquidate the balance of the purchase price, the Plaintiffs were constrained to and indeed issued a Rescission notice, which effectively took effect on May 28, 2014.

28. In the premises, the Plaintiffs' have submitted that upon rescission of the Sale Agreement, the contract between the Plaintiffs' on one hand and the Defendant on the other hand ceased to exist.

29. In support of the forgoing submissions the Plaintiffs have relied in the decisions in the case of *Karanja Mbugua & Another v Marybin Holding Company Ltd* (2014) eKLR and *Housing Company of East Africa Ltd v Board of Trustees National Social Security Fund & 2 Others* (2018) eKLR.

30. On the other hand, the Plaintiffs' counsel have further submitted that upon the rescission of the Sale agreement, the Defendant herein ceased to hold and/or have any legal interest and/or claim over and in respect of the suit premises and same thereby became a trespasser to the suit property.

31. Based on the foregoing, the Plaintiffs have therefore sought that the Defendant be declared a Trespasser and thereafter, same be ordered to pay Mense Profits, for the entire duration between May 28, 2014 to June 22, 2018, when same vacated the suit premises.

32. In support of the claim for payment of Mense Profits, the Plaintiffs' herein have relied in the decision in the case of *Attorney General v Halal Meat Products Ltd* (2016) eKLR.

33. Be that as it may, the Plaintiffs have sought that the Defendant herein be condemned to pay not only the Mense Profits, but also the Cost of the subject suit.

Issues for Determination:

34. Having reviewed the Plaint filed by and/or on behalf of the Plaintiffs, the witness statements and the bundle of Documents, which were thereafter admitted as exhibits and having similarly taken cognizance of the Oral testimony rendered by the 1st Plaintiff and finally, having considered the written submissions duly filed, the following issues do arise and are thus germane for determination;

    i. Whether the Sale Agreement between the Plaintiffs on one hand and the Defendant on the other hand was lawfully Rescinded.

    ii. Whether upon the Rescission of the Sale Agreement, the Defendant became a Trespasser to the suit property.

    iii. Whether the Plaintiffs' are entitled to payment of Mense Profits and if so, the Quantum payable.

Analysis and Determination:

Issue Number 1: Whether the Sale Agreement between the Plaintiff's on one hand and the Defendant on the other hand was lawfully Rescinded.

35. Pursuant to the Agreement for Sale entered into on November 19, 2013, the Plaintiffs on one hand and the Defendant on the other hand, agreed to sell the suit property to the Defendant, who in turn agreed to buy same on terms that were well stipulated and/or contained at the foot of the subject Sale Agreement.

36. It is also worthy to note that vide the terms of the Sale Agreement, the Plaintiffs and the Defendant agreed and covenanted that time was to be of the essence in respect of any and all of either Party's obligation, pursuant to the Sale Agreement.

37. Other than the foregoing, it was also agreed that in the event that either Party failed and/or neglected to comply with their obligations under the Sale agreement, then the Party at fault, was to be issued and

served with a 21 days' notice in writing calling upon the defaulting party to remedy the default and to comply with his/her obligations under the Sale agreement.

38. It is common ground that the sale agreement between the Plaintiffs and the Defendant was to be completed within 90 days from the date of execution of the Sale Agreement. For clarity, the Sale Agreement was executed on November 19, 2013.

39. Based on the foregoing, it is therefore worthy to note that the Sale Agreement ought to have been completed on or before February 19, 2014. However, the Defendant herein did not pay the balance of the Purchase price within the completion duration.

40. As a result of the foregoing, the Plaintiffs' were constrained to and indeed issued a 21 days' notice in writing to the Defendant and in respect of which the Defendant was called upon to perform the outstanding obligation, namely, payment of the balance of the Purchase price. See clause 11 of the Sale Agreement.

41. Nevertheless, despite having being issued and served with the 21 days' Notice in writing, the Defendant failed and/or neglected to adhere to and/or comply with the terms of the Notice and thereby exposed himself to the rescission of the Contract.

42. Suffice it to note, that upon the lapse of the 21-day period, the Plaintiffs' herein preceded to and served the Defendant with a rescission notice dated May 6, 2014, whereby same sought to rescind the Contract. For the avoidance of Doubt, it is worthy to note that prior to Rescission, it is incumbent upon the Party keen to exercise such Right to effect service of Rescission Notice.

43. In support of the foregoing observation, it is imperative to take cognizance of the decision in the case of *Njamunyu v Nyaga* (1983) eKLR, where the Court Of Appeal observed as hereunder;

> " … before an Agreement such as this can be rescinded, the Party in default should be notified of the default and given reasonable time within which to rectify it. Once notice of default has been given, failure to rectify will result in rescission of the contract"

44. It is imperative to note that the sale agreement which was executed between the Plaintiffs on one hand and the Defendant on the other hand, made time of essence and therefore it was incumbent upon the Defendant to endeavor to comply with the timelines stipulated pursuant to the Sale agreement.

45. In the event of default, the innocent Party, in this case the Plaintiffs, were entitled to rescind the contract. For clarity, the contract was indeed rescinded and same therefore ceased to exist in the eyes of the Law.

46. In support of the observation that a valid rescission notice terminates the contract, it is imperative to take note of the decision in the case of *Housing Company of East African Ltd v Board of Trustees, National Social Security Fund & 2 Others* (2018) eKLR, where the Court of appeal held as hereunder;

> " This court is reminded that the law on rescission of a contract for sale of land is to the effect that if the contract contains a condition entitling the vendor to rescind on the happening of certain events, and those events happen, then the vendor may rescind. In the absence of such a condition, the vendor may rescind only if the purchaser's conduct is such as to amount to a repudiation of the contract, and the parties can be restored to their former position. See Halsbury's Law of England Volume 42, 4th Edition at paragraph 242 in this respect.

47. In a nutshell, it is my finding and holding that the Agreement for sale, which had been entered into between the Plaintiffs and the Defendant herein, was duly and lawfully rescinded and thus same was rendered otiose.

Issue Number 2

Whether upon the Rescission of the Sale Agreement, the Defendant became a Trespasser to the suit property.

48. The Defendant herein was voluntarily allowed to enter upon and take possession of the suit property by the Plaintiffs, albeit in anticipation of completion of the Sale Agreement and in good faith.

49. Based on the foregoing, it is common ground that the Defendant's initial entry upon and possession of the suit premises, was based on permission and consent. For clarity, the Defendant was therefore in occupation of the premises lawfully and in pursuance of the Sale Agreement.

50. Nevertheless, the Sale Agreement, which predicated and/or premised the entry upon and occupation of the suit premises by the Defendant, was never concluded and/or finalized.

51. On the other hand, when the Sale Agreement fell through, the Plaintiffs herein issued and served the Defendant with a rescission notice, which effectively terminated the contract. Consequently, upon the termination of the contract vide rescission, the Defendant herein was obliged to vacate and hand over vacant possession of the suit property.

52. Nevertheless, despite the rescission of the Sale Agreement and the extinction of the Defendant's rights to the suit property, if any, the Defendant remained in possession and/or occupation of the suit property, albeit with no lawful rights, Interest and/or claim thereto.

53. It is important to note that the moment the Sale agreement was duly rescinded, the foundation upon which the Defendant was allowed to enter onto the suit premises lapsed and the Defendant effectively became a trespasser onto the suit property.

54. For the avoidance of doubt, it is important to take cognizance of the provisions of Section 3 of the *Trespass Act*, Chapter 294 Laws of Kenya, which provides as hereunder;

    3. Trespass upon private land

        (1) Any person who without reasonable excuse enters, is or remains upon, or erects any structure on, or cultivates or tills, or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.

        (2) Where any person is charged with an offence under subsection (1) of this section the burden of proving that he had reasonable excuse or the consent of the occupier shall lie upon him.

55. In respect of the subject matter, I have pointed out herein before that even though the initial entry was premised on permission or consent, but the actions of the Defendant of remaining upon the premises, long after the permission was terminated and/or withdrawn vide the rescission notice, constitutes and/or amounts to trespass.

56. Based on the foregoing, I therefore find and hold that the Defendant was indeed a trespasser unto the suit premises w e f May 28, 2014, same being the date when the rescission notice, took effect.

Issue Number 3

Whether the Plaintiffs' are entitled to payment of Mense Profits and if so, the Quantum payable.

57. The suit property, which was the subject of the Sale agreement between the Plaintiffs on one part and the Defendant on the other part, was a fully developed residential apartment, which was ready for occupation and indeed which the Defendant herein entered upon and took possession thereof.

58. During the Plaintiffs' testimony, the Plaintiff produced unto the court a copy of the valuation report over and in respect of the suit premises and the valuation report showed that the open market value in respect of the suit property stood at Kshs 19, 000, 000/= Only, as at November 21, 2017.

59. On the other hand, the Valuation report also indicated that the Monthly rent in respect of the suit property was Kshs.100, 000/= Only, as at November 2017.

60. Based on the foregoing, it is therefore apparent that the suit property was one that would attract and/or generate rental income on a monthly basis. However, the Defendant herein occupied and remained in occupation thereof between May 28th May 2014 to June 22, 2018, both dates inclusive.

61. It is also worth noting that despite having remained in occupation of the suit property for the period under reference, the Defendant herein did not pay any rents and/or the equivalent thereof, to the registered proprietor and/or owners of the suit property.

62. In short, the Defendant remained in occupation of the suit property and by virtue of his occupation thereof, same denied and/or deprived the Plaintiffs of the legitimate right to extract rental income and/or benefits from the suit property. Consequently, the Plaintiffs were exposed to and indeed suffered loss, for which same are entitled to recompense.

63. For coherence, the nature of compensation that would accrue to the Plaintiffs herein would not be Rents, insofar as the Defendant was not a tenant, but a trespasser.

64. Consequently, what the Plaintiffs are entitled to would be Mense Profits, reckoned on the basis of what the Plaintiffs would have obtained and/or accrued from the suit premises save for the unlawful acts and/or actions of the Defendant herein.

65. To this extent, the valuation report which was produced shows that the Monthly rent which would have been derivable from the suit property was Kshs 100, 000/= Only, per Month.

66. Based on the preceding observation, the Mense Profits, that is due and payable to the Plaintiffs is reckoned on the same benchmark, that is, what the Plaintiffs ought to have received from the Suit Premises, were it not for the deprivation at the instance of the Defendant herein.

67. In support of the foregoing position of the law, this Court adopts and reiterates the holding of the Court of Appeal in the case of *Attorney General v Halal Meat Products Ltd* (2016) eKLR, where the court stated as hereunder;

> "It follows therefore that where a person is wrongfully deprived of his property he/she is entitled to damages known as mesne profits for loss suffered as a result of the wrongful period of occupation of his/her property by another. See *McGregor on Damages*, 18th Ed. para 34-42.

68. Premised on the foregoing, it is therefore my finding and holding that the Plaintiffs' herein are entitled to payment of Kshs 100, 000/= only, per month for the entire duration of the unlawful and illegal occupation of the suit property by the Defendant. Consequently, the amount payable is as hereunder;

June 2014 to June 2018 = 48 month

48 months x Kes.100, 000 = Kshs 4, 800, 000/= Only.

Final Disposition:

69. Having reviewed and addressed all the issues of determination that were outlined herein before, the court comes to the conclusion that the Plaintiffs' have proved their case on a balance of probabilities.

70. Consequently and in the premises, the Court now make the following orders;

    i. A Declaration be and is hereby issued that the Defendant was indeed a trespasser in the suit property w e f May 28, 2014, when the rescission Notice duly took effect.

    ii. The Plaintiffs' are entitled to recompense on the basis of Mense Profits computed in the sum of Kshs 100, 000/= only, per Month w e f June 2014 up to and including June 2018, re-presenting a total of 48 months.

    iii. Consequently, the Plaintiffs be and are hereby awarded the sum of Kshs 4, 800, 000/= only on account of Mense profits.

    iv. The award of Mense Profits shall attract interests at court rates w e f May 2018.

    v. Costs be and are hereby awarded to the Plaintiffs.

71. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 12TH DAY OF MAY 2022.

HON JUSTICE OGUTTU MBOYA

JUDGE

In the Presence of;

Kevin Court Assistant

Ms Ouko for the Plaintiff

No Appearance for the Defendant